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UNITED STATES DISTRICT COURT

9

SOUTHERN DISTRICT OF CALIFORNIA

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11 THOMAS A. MOORE, ) Civil No. 09cv00767 BEN(RBB)  
12 )  
13 Plaintiff, ) **REPORT AND RECOMMENDATION**  
14 ) **GRANTING DEFENDANTS' MOTION TO**  
15 v. ) **DISMISS PLAINTIFF'S FIRST**  
16 ) **AMENDED COMPLAINT [ECF NO. 30]**  
17 DEBRA LACY; PAULA M. JARNECKE; )  
18 ROBERT F. MCFADDEN; R.D. WOODS; )  
19 VILLASENOR, )  
20 )  
21 Defendants. )  
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18 Defendants Debra A. Lacy, Paula M. Jarnecke, Robert F. McFadden, R. D. Woods, and Villasenor filed their Motion to Dismiss This Action. (Mot. Dismiss, ECF No. 30.) Plaintiff Thomas A. Moore has not filed an opposition to the Motion.

22

**I. PROCEDURAL BACKGROUND**

23 Plaintiff Thomas A. Moore, a former federal inmate proceeding  
24 pro se and in forma pauperis, filed this civil rights action on  
25 April 13, 2009, pursuant to Bivens v. Six Unknown Named Fed.  
26 Narcotics Agents, 403 U.S. 388 (1971) [ECF Nos. 1, 5]. On July 16,  
27 2009, the Court sua sponte dismissed the Complaint without  
28 prejudice for failure to state a claim but granted Plaintiff leave

1 to amend [ECF No. 5]. Moore then filed a motion requesting an  
2 extension of time to amend his Complaint, which the Court granted  
3 on August 6, 2009, giving him until October 19, 2009, to amend [ECF  
4 Nos. 8, 9]. On August 17, 2009, Plaintiff filed a notice of change  
5 of address [ECF No. 10].

6 Moore's First Amended Complaint was filed nunc pro tunc to  
7 October 26, 2009 [ECF Nos. 11, 12]. Plaintiff alleges that his  
8 constitutional rights were violated when he was incarcerated at  
9 Metropolitan Correctional Institution in San Diego. (Am. Compl. 1,  
10 ECF No. 12.) In count one of the Amended Complaint, Moore contends  
11 his rights to be free from cruel and unusual punishment and to  
12 receive adequate medical care were violated when prison officials  
13 failed to properly treat cuts and sores in his mouth. (Id. at 2-  
14 4.) In count two, Plaintiff asserts Defendants' actions amounted  
15 to a deliberate indifference to his serious medical needs. (Id. at  
16 4-5.)

17 Summons were returned unexecuted for Defendants McFadden,  
18 Woods, and Jarnecke, but were returned executed for Defendants  
19 Villasenor and Lacy [ECF Nos. 15, 16, 17, 18, 19]. On February 5,  
20 2010, all five Defendants filed a Notice of Failure to Complete  
21 Service on any Defendant [ECF No. 20]. Defendants subsequently  
22 filed a Notice of Plaintiff's Non-Compliance With Civ. L.R.  
23 83.11.b, failure to provide the Court with a current address [ECF  
24 No. 21]. On June 2, 2010, this Court ordered that a telephonic  
25 case management conference be held on July 1, 2010; the Clerk of  
26 Court mailed the order to Plaintiff's last known address, but it  
27 was returned undelivered [ECF Nos. 23, 24]. Defendants filed a  
28 Notice of Returned Mail, indicating that the order setting the

1 conference had not been delivered [ECF No. 25]. Moore did not  
2 participate in the case management conference [ECF No. 26, 28].  
3 The Court's Case Management Conference Order set another telephonic  
4 conference for December 2, 2010. (Case Mgmt. Conference Order 3,  
5 July 1, 2010, ECF No. 27.) The corresponding minute order and  
6 order regulating discovery were mailed to Plaintiff; they, too,  
7 were returned to the clerk as undeliverable [ECF No. 29].

8 On July 27, 2010, all named Defendants filed this Motion to  
9 Dismiss [ECF No. 30]. The motion hearing was originally set for  
10 September 13, 2010, before United States District Court Judge Roger  
11 Benitez [see ECF No. 3]. It was vacated and reset for the same day  
12 before this Court [ECF No. 31]. The minute order reflecting this  
13 change was mailed to Plaintiff, but it was returned as  
14 undeliverable as well [ECF No. 32].

15 On August 27, 2010, the Court found Defendants' Motion  
16 suitable for decision without oral argument, pursuant to Southern  
17 District of California Civil Local Rule 7.1(d)(1) [ECF No. 33].  
18 Moore did not file an opposition to the Motion, and on September 1,  
19 2010, Defendants filed a notice that they had not received any  
20 opposition to their Motion [ECF No. 34]. Defendants subsequently  
21 filed an Ex Parte Request to Vacate All Discovery Dates [ECF No.  
22 35]. The Court granted Defendants' request, vacating all discovery  
23 dates and converting the December 2, 2010 telephonic settlement  
24 conference to a telephonic status conference [ECF No. 36]. On  
25 December 2, 2010, the Court held a telephonic conference with  
26 counsel for Defendants; Plaintiff again did not participate.  
27 (Mins. Dec. 2, 2010, ECF No. 37.)

28

## II. DEFENDANTS' MOTION TO DISMISS

2 Defendants Lacy, Jarnecke, McFadden, Woods, and Villasenor  
3 move to dismiss the First Amended Complaint for Plaintiff's failure  
4 to prosecute. (Mot. Dismiss Attach. #1 Mem. P. & A. 1, ECF No.  
5 30.) In support of their Motion, they argue that Moore has failed  
6 to pursue this action because (1) Plaintiff did not appear at the  
7 case management conference, (2) he terminated communication with  
8 the Court by failing to provide a current mailing address, and (3)  
9 Moore has not properly served any Defendant in accordance with  
10 Federal Rule of Civil Procedure 4. (Id.) Defendants urge the  
11 Court to dismiss the Amended Complaint, pursuant to Federal Rule of  
12 Civil Procedure 41(b). (Id. at 9.)

13        Although Civil Local Rule 7.1(f)(3)(c) provides that failure  
14 to oppose a motion may constitute consent to granting it, this  
15 Court will evaluate the merits of Defendants' Motion to Dismiss.  
16 See S.D. Cal. Civ. L.R. 7.1(8)(3)(c). The Court has reviewed the  
17 Amended Complaint, Defendants' Motion and attachments, and  
18 Defendants' Notice of Non-Receipt of any Opposition to the Motion  
19 to Dismiss this Action and attachment. For the reasons set forth  
20 below, the district court should **GRANT** Defendants' Motion to  
21 Dismiss.

### III. DISCUSSION

## 23 A. Failure to Attend Conferences

24 Defendants' Motion was filed on July 27, 2010. Consequently,  
25 it only addresses Moore's failure to attend the July 1, 2010 case  
26 management conference. (See Mot. Dismiss Attach. #1 Mem. P. & A.  
27 1-5, ECF No. 30.) Where appropriate, the Court will also refer to  
28 Plaintiff's failure to attend the December 2, 2010 telephonic

1 conference. (See Mins., Dec. 2, 2010, ECF No. 37.)

2 On June 2, 2010, the Court scheduled a telephonic case  
 3 management conference for July 1, 2010, and ordered that defense  
 4 counsel make arrangements for Plaintiff, who was in custody at the  
 5 time, to appear telephonically. (Case Mgmt. Conference Order 1,  
 6 ECF No. 23.) The order was returned to the clerk undelivered, and  
 7 Moore was not a party to the July telephonic conference. (Mail  
 8 Returned Undeliverable Case Mgmt. Conference Order, ECF No. 24;  
 9 Case Mgmt. Conference Order 1, ECF No. 27.) The Court noted in its  
 10 scheduling order that Plaintiff did not appear and set another  
 11 telephonic conference for December 2, 2010. (Am. Case Mgmt.  
 12 Conference Order 1, 3, ECF No. 28.)

13 The minute order setting the December 2, 2010 telephonic  
 14 conference was returned as undeliverable [ECF Nos. 26-29]. On  
 15 December 2, 2010, counsel for Defendants participated in the  
 16 telephonic conference; Plaintiff did not. (Mins., Dec. 2, 2010,  
 17 ECF No. 37.)

18 Defendants argue that Moore was on notice of the July 1, 2010  
 19 conference because the Court mailed its scheduling order to Moore.  
 20 (Mot. Dismiss Attach. #1 Mem. P. & A. 4, ECF No. 30.) "The  
 21 Defendants also sent by mail an offer to facilitate the Plaintiff's  
 22 participation in the [July 1, 2010] telephonic Case Management  
 23 Conference." (Id. at 5.) Nonetheless, Plaintiff failed to  
 24 participate. (Id. at 4.) Defendants argue that local rules  
 25 require that "[t]he parties who have responsibility over the  
 26 litigation and the counsel who is responsible for the case, will be  
 27 present at the case management conference." (Id. at 5.)

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1        Both the Southern District of California Local Rules and the  
 2 Federal Rules of Civil Procedure allow a district court to dismiss  
 3 an action for failure to comply with a court order. Fed. R. Civ.  
 4 P. 41(b); S.D. Cal. Civ. L.R. 41(b); see also Ferdik v. Bonzelet,  
 5 963 F.2d 1258, 1260 (9th Cir. 1992); Link v. Wabash R.R. Co., 370  
 6 U.S. 626, 629-30 (1962) (holding that the court has inherent power  
 7 to achieve the orderly and expeditious disposition of cases by  
 8 dismissing actions for failure to prosecute). Even a pro se  
 9 litigant must follow the orders of the court. Ghazali v. Moran, 46  
 10 F.3d 52, 54 (9th Cir. 1995).

11        Moore has failed to comply with the Court's orders requiring  
 12 that he appear telephonically at the July 1, 2010 case management  
 13 conference and December 2, 2010 settlement conference. Because the  
 14 orders setting the conferences were returned as "undeliverable,"  
 15 the Court will consider Plaintiff's failure to notify the Court of  
 16 any new address in conjunction with his failure to prosecute.

17 **B. Failure to Provide a Current Mailing Address**

18        Every litigant has an obligation to keep the Court apprised of  
 19 his or her correct address. Carey v. King, 856 F.2d 1439, 1441  
 20 (9th Cir. 1988). Although courts must construe pro se pleadings  
 21 liberally, a pro se litigant must follow the rules of the court.  
 22 Ghazali, 46 F.3d at 54; see also Jacobsen v. Filler, 790 F.2d 1362,  
 23 1364-65 (9th Cir. 1986).

24        The failure to follow a district court's local rules is a  
 25 proper ground for dismissal under Federal Rule of Civil Procedure  
 26 41(b) and local rules. See also S.D. Cal. Civ. L.R. 41.1(b);  
 27 Ghazali, 46 F.3d at 53. Civil Local Rule 83.11(b) provides, "A  
 28 party proceeding pro se must keep the court and opposing parties

1 advised as to current address." S.D. Cal. Civ. L.R. 83.11(b).  
 2 Additionally, the Court may dismiss a case when the plaintiff does  
 3 not inform the Court of his current address. Id. When the clerk  
 4 directs mail to a pro se plaintiff's last designated address and it  
 5 is returned as undeliverable, the Court may dismiss the case for  
 6 failure to prosecute, unless the plaintiff provides a current  
 7 address within sixty days. S.D. Cal. Civil L.R. 83.11(b).

8 Plaintiff has advised the Court of a new address in the past.  
 9 On August 17, 2009, Moore filed a notice of change of address.  
 10 (See Mot. Dismiss Attach. #2 Ex. A, ECF No. 30.) Plaintiff was  
 11 released from custody on February 4, 2010. (Id. Attach. #1 Mem. P.  
 12 & A. 3 (citing id. Attach. #2 Ex. F).) On February 5, 2010,  
 13 Defendants filed a notice that Plaintiff did not complete service  
 14 and mailed it to the address Plaintiff provided on August 17, 2009,  
 15 but Defendants' notice was returned undelivered. (Id. Attach. #2  
 16 Ex. B.) On March 10, 2010, Defendants notified the Court of  
 17 Moore's failure to provide the Court with a current address. (Id.  
 18 at Ex. C.) The clerk sent other court documents to Moore that were  
 19 returned undelivered on June 10, July 12, and August 11, 2010 [ECF  
 20 Nos. 24, 29, 32]. To date, Moore has not updated his address.

21 Defendants claim, "Despite his demonstrated knowledge of how  
 22 to advise the Court of an address change, [citation], Plaintiff has  
 23 failed to advise the Court of his current address." (Mot. Dismiss  
 24 Attach. #1 Mem. P. & A. 5, ECF No. 30.) Also, they argue that this  
 25 "inhibits the orderly handling of this case, prevents the Court  
 26 from communicating with Plaintiff, and evidences Plaintiff's loss  
 27 of interest in this case now that he is out of prison." (Id. at  
 28 4.)

1        Since the first undelivered mail was returned to the clerk on  
2 June 10, 2010, more than six months have passed, and Plaintiff has  
3 not updated his address. "A party, not the district court, bears  
4 the burden of keeping the court apprised of any changes in his  
5 mailing address." See Carey, 856 F.2d at 1441. Moore's failure to  
6 keep the Court and opposing counsel informed of his whereabouts  
7 leaves no realistic alternative but to dismiss the action without  
8 prejudice. See S.D. Cal. Civ. L.R. 83.11(b) (permitting dismissal  
9 for failure to provide current address within sixty days of mail  
10 being returned undelivered); Carey, 856 F.2d at 1441.

11 **C. Failure to Prosecute**

12        Defendants allege that Plaintiff has failed to prosecute this  
13 matter, and it should be dismissed. (Mot. Dismiss Attach. #1 Mem.  
14 P. & A. 4, 6, ECF No. 30.) They assert Moore's unreasonable delays  
15 have prejudiced them. (Id. at 4.) "The prolonged continuation of  
16 their status as individual defendants compromises their credit  
17 ratings (due to the possibility of an adverse civil judgment),  
18 causes emotional upset and uncertainty, prevents predictably  
19 planning personal financial matters, and is fundamentally unfair."  
20 (Id.)

21        A district court's authority to dismiss a plaintiff's action  
22 because of his failure to prosecute is well established. Link, 370  
23 U.S. at 629; see Fed. R. Civ. P. 41(b); Moneymaker v. CoBen (In re  
24 Eisen), 31 F.3d 1447, 1451 (9th Cir. 1994). "The power to invoke  
25 this sanction is necessary in order to prevent undue delays in the  
26 disposition of pending cases and to avoid congestion in the  
27 calendars of the district courts." Link, 370 U.S. at 629-30.

28 //

1       Moore's failure to participate in two conferences and provide  
2 the Court with a current address suggests that he has no interest  
3 in prosecuting this case. Exhibit one to the Declaration of Nellie  
4 T. Klein shows that as of July 13, 2010, Moore's "release  
5 destination" was Rosarito, Mexico. (Mot. Dismiss Attach. #2 Ex. F  
6 Klein Decl., ECF No. 30.) The combination of factors is compelling  
7 evidence that Moore no longer intends to pursue this action.

8       In determining whether to dismiss a case for failure to  
9 prosecute, the district court should consider five factors: "(1)  
10 the public's interest in expeditious resolution of litigation; (2)  
11 the court's need to manage its docket; (3) the risk of prejudice to  
12 the defendants; (4) the public policy favoring disposition of cases  
13 on their merits; and (5) the availability of less drastic  
14 sanctions." Moneymaker v. CoBen (In re Eisen), 31 F.3d at 1451  
15 (citing Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986)).  
16 "A dismissal may be affirmed where 'at least four factors support  
17 dismissal, or where at least three factors strongly support  
18 dismissal.'" Mohtadi v. Terayon Commc'ns Sys. Inc., 100 F. App'x  
19 691, 693 (9th Cir. 2004) (quoting Yourish v. Cal. Amplifier, 191  
20 F.3d 983, 990 (9th Cir. 1999)).

21       The first and second factors support dismissal. When  
22 analyzing the public's interest in expeditious resolution of  
23 litigation and the court's interest in docket control, the Ninth  
24 Circuit has noted, "It is incumbent upon us to preserve the  
25 district courts' power to manage their dockets without being  
26 subject to the endless vexatious noncompliance of [certain]  
27 litigants." Ferdik, 963 F.2d at 1261. This lawsuit has been  
28 pending since April 13, 2009; Moore last acted to prosecute his

1 case on October 28, 2009, when he filed his First Amended Complaint  
 2 (ECF Nos. 1, 12.) Plaintiff's lack of involvement over the past  
 3 year has hindered the Court's ability to efficiently manage its  
 4 docket.

5 The third factor weighs in favor of dismissal as well. When  
 6 considering the risk of prejudice to a defendant, courts examine  
 7 whether the plaintiff's actions impair the defendant's ability to  
 8 prepare for trial or interfere with the rightful decision of the  
 9 case. See Malone v. United States Postal Serv., 833 F.2d 128, 131  
 10 (9th Cir. 1987) (finding prejudice where government complied with  
 11 court order in timely manner but plaintiff did not, and plaintiff's  
 12 excuse was groundless). Unless the plaintiff can give a "non-  
 13 frivolous excuse for [unreasonable] delay," prejudice to defendants  
 14 is presumed. Hernandez v. City of El Monte, 138 F.3d 393, 400-01  
 15 (9th Cir. 1998); Moore v. Telfon Commc'n Corp., 589 F.2d 959, 967-  
 16 68 (9th Cir. 1978); Anderson v. Air West, Inc., 542 F.2d 522, 524  
 17 (9th Cir. 1976). Here, Defendants have consistently complied with  
 18 court orders in a timely manner. Plaintiff's absence has  
 19 frustrated Defendants' ability to effectively litigate. See  
 20 Malone, 833 F.2d at 131. They have expended time and resources  
 21 defending a case that is not being litigated by Moore. There is no  
 22 evidence that rebuts the presumption that Plaintiff's unreasonable  
 23 delay has prejudiced Defendants. Hernandez, 138 F.3d at 400-01.

24 Another factor, a consideration of alternatives, also favors  
 25 dismissal. This factor may be satisfied by the court's use and  
 26 consideration of less drastic alternatives. See Valley Eng'r's Inc.  
 27 v. Elec. Eng'g Co., 158 F.3d 1051, 1057 (9th Cir. 1998) (discussing  
 28 dismissal as a sanction for a discovery violation); see, e.g.,

1     Ferdik, 963 F.2d at 1262 (finding alternatives employed when court  
 2     gave plaintiff an opportunity to avoid dismissal by amending his  
 3     complaint to comply with federal rules); Nevijel v. North Coast  
 4     Life Ins. Co., 651 F.2d 671, 674 (9th Cir. 1981) (explaining that  
 5     less drastic alternatives for failing to comply with pleading rules  
 6     include allowing further amended complaints) Furthermore, the  
 7     requirement can be satisfied by a court warning that the failure to  
 8     obey the court's order will result in dismissal. Valley Eng'rs  
 9     Inc., 158 F.3d at 1057; Ferdik, 963 F.2d at 1262; Malone, 833 F.2d  
 10    at 132; Henderson, 779 F.2d at 1424.

11           In this case, a telephonic conference was set for July 1,  
 12 2010, and although Plaintiff did not participate, a second  
 13 telephonic conference was scheduled for December 2, 2010. (Case  
 14 Mgmt. Conference Order 1, June 2, 2010, ECF No. 23; Case Mgmt.  
 15 Conference Order 3, July 1, 2010, ECF No. 27.) Furthermore, the  
 16 Court's recommendation is that Plaintiff's Amended Complaint be  
 17 dismissed without prejudice. Moore is being given thirty days from  
 18 this Report and Recommendation to file any objections and explain  
 19 why his action should not be dismissed. The Court has employed  
 20 alternatives less drastic than a simple dismissal.

21           Although the remaining factor, the public policy in favor of  
 22 resolving cases on their merits, weighs against dismissal, it may  
 23 be outweighed if the other factors strongly support dismissal. See  
 24 Ferdik, 963 F.2d at 1263 (finding dismissal appropriate where only  
 25 three factors supported dismissal); see also Valley Eng'rs Inc.,  
 26 158 F.3d at 1057 (noting that the five-factor test provides the  
 27 district court with flexibility in its determination, not with  
 28 strict conditions precedent to dismissal).

1       When Plaintiff's failure to participate in this litigation is  
 2 viewed as a whole, dismissal without prejudice is appropriate.

3       **D. Inadequate Service of Process**

4       All five Defendants assert they have not properly been served  
 5 in accordance with Federal Rule of Civil Procedure 4. (Mot.  
 6 Dismiss Attach. #1 Mem. P. & A. 7-9, ECF No. 30.) Moreover, they  
 7 argue that Plaintiff disregarded their notice to him of his  
 8 improper service. (Id. at 9.) "Notice of this deficiency was  
 9 filed February 5, 2010, well within the time for Plaintiff to cure  
 10 the deficiency before the 120-day period expired on February 25,  
 11 2010. However, Plaintiff did nothing." (Id.) Defendants claim  
 12 that despite multiple court filings and Plaintiff's release from  
 13 custody, Moore never corrected his defective service. (Id. at 1.)

14       "[S]ervice of process is the means by which a court asserts  
 15 its jurisdiction over the person." SEC v. Ross, 504 F.3d 1130,  
 16 1138 (9th Cir. 2007) (citing Benny v. Pipes, 799 F.2d 489, 492 (9th  
 17 Cir. 1986)). For a federal court to obtain personal jurisdiction,  
 18 the Ninth Circuit requires that service of process be in  
 19 "substantial compliance" with Rule 4 of the Federal Rules of Civil  
 20 Procedure. Jackson v. Hayakawa, 682 F.2d 1344, 1347 (9th Cir.  
 21 1982). A plaintiff is responsible for ensuring that the summons  
 22 and complaint are served on each defendant within the time required  
 23 by Federal Rule of Civil Procedure 4(m). Fed. R. Civ. P. 4(c)(1).

24       Because Plaintiff is proceeding in forma pauperis, he is  
 25 entitled to have the summons and Complaint in his case served by  
 26 the United States Marshal. Puett v. Blandford, 912 F.2d 270, 273  
 27 (9th Cir. 1990) (citing Romandette v. Weetabix Co., 807 F.2d 309,  
 28 310 n.1 (2d Cir. 1986); see also Fed. R. Civ. P. 4(c)(2)(B)(I).

1 The "officers of the court shall issue all service of process." 28  
 2 U.S.C. § 1915(a)(1). "Although a plaintiff . . . proceeding in  
 3 forma pauperis may rely on service by the Marshal, such plaintiff  
 4 'may not remain silent and do nothing to effectuate such service;'  
 5 rather, '[a]t a minimum, a plaintiff should request service upon  
 6 the appropriate defendant and attempt to remedy any apparent  
 7 defects of which [he] has knowledge.'" Jenkins v. Caplan, No. C  
 8 02-5603 RMW (PR), 2009 U.S. Dist. LEXIS 11275, at \*11 (N.D. Cal.  
 9 Feb. 13, 2009) (quoting Rochon v. Dawson, 828 F.2d 1107, 1110 (5th  
 10 Cir. 1987)). A plaintiff proceeding in forma pauperis may face  
 11 dismissal where he fails to instruct the United States Marshal to  
 12 serve the necessary parties. See Walker v. Sumner, 14 F.3d 1415,  
 13 1422 (9th Cir. 1994) (overruled on other grounds by Sandin v.  
 14 Connor, 515 U.S. 472 (1995)).

15       1. **Federal Rule of Civil Procedure 4(i) -- Serving the  
 16           United States and Its Agencies, Corporations, Officers,  
 17           or Employees**

18       Defendants claim Plaintiff's service was inadequate because he  
 19 did not comply with Rule 4(i) of the Federal Rules of Civil  
 20 Procedure. (Mot. Dismiss Attach. #1 Mem. P. & A. 8, ECF No. 8.)  
 21 Specifically, Defendants Lacy and McFadden, sued in their official  
 22 capacity, assert Plaintiff did not serve a copy of the summons and  
 23 Amended Complaint on the United States Attorney or the Attorney  
 24 General of the United States. (Id. (citing Fed. R. Civ. P.  
 25 4(i)(1).) Defendant Lacy also contends that "[p]artial service on  
 26 [her] under Rule 4(d) was incorrect and incomplete." (Id. (citing  
 27 Waiver Serv. Returned Executed Debra Lacy [ECF No. 19]).) McFadden  
 28 claims he, too, was never served because the summons was returned  
 because the address was invalid. (Id. (citing Summons Returned

1 Unexecuted Robert F. McFadden [ECF No. 15]).) Defendants Jarnecke  
 2 and Woods argue that Moore attempted to serve each of them by mail,  
 3 but the corresponding summonses were returned for invalid  
 4 addresses. (Id. (citing Waiver Serv. Returned Unexecuted R.D.  
 5 Woods [ECF No.16]; Waiver Serv. Returned Unexecuted Paula M.  
 6 Jarnecke [ECF No. 17]).) Lastly, Defendant Villasenor alleges  
 7 Moore never served the United States Attorney or the Attorney  
 8 General of the United States, and he complains that "partial  
 9 service" on him was "incorrect and incomplete" under Federal Rule  
 10 of Civil Procedure 4(d). (Id. (citing Waiver Serv. Returned  
 11 Executed Villasenor [ECF No. 18]).)

12 Under Bivens, a plaintiff can bring an action for money  
 13 damages against "federal agents acting under color of their  
 14 authority for injuries caused by their unconstitutional conduct."  
 15 Vaccaro v. Dobre, 81 F.3d 854, 856 (9th Cir. 1996) (citing Bivens,  
 16 403 U.S. 388). To serve a federal officer or employee sued only in  
 17 an official capacity, the party must "serve the United States and  
 18 also send a copy of the summons and of the complaint by registered  
 19 or certified mail to the [officer or employee]." Fed. R. Civ. P.  
 20 4(i)(2). Effective service on a federal officer or employee who is  
 21 sued in an individual capacity for conduct relating to duties  
 22 performed on behalf of the United States, regardless of whether he  
 23 is also sued in an official capacity, requires that the party  
 24 "serve the United States and also serve the officer or employee  
 25 under Rule 4(e), (f), or (g)." Fed. R. Civ. P. 4(i)(3).

26 Rule 4(i) of the Federal Rules of Civil Procedure provides the  
 27 manner in which a plaintiff must effect service of process when  
 28 suing the United States. The plaintiff must deliver a copy of the

1 summons and complaint to (1) the United States attorney for the  
 2 district in which the action is brought, (2) send the summons and  
 3 complaint by registered or certified mail to the Attorney General  
 4 of the United States at Washington, D.C., and (3) if a non-party  
 5 agency ruling is challenged, send the summons and complaint to the  
 6 agency that took the complained of actions. Fed. R. Civ. P.  
 7 4(i)(1)(A)-(C), (2).

8 The Ninth Circuit has concluded that service upon the United  
 9 States is not necessary in a Bivens action. Vaccaro, 81 F.3d at  
 10 856-57. In Vaccaro, the court held that although plaintiff did not  
 11 serve the United States Attorney or the Attorney General, service  
 12 was nonetheless sufficient because plaintiff had not sued the  
 13 United States; rather, he had "sued its officers as individuals,  
 14 not in their official capacity." Id. at 856. The court reasoned  
 15 that, by definition, Bivens claims are brought against defendants  
 16 in their individual capacities. Id. at 856-57. "'[A] Bivens  
 17 action can be maintained against a defendant in his or her  
 18 individual capacity only, and not in his or her official  
 19 capacity[.]"' Id. at 857 (quoting Daly-Murphy v. Winston, 837 F.2d  
 20 348, 355 (9th Cir. 1988); see FDIC v. Mayer, 510 U.S. 471, 484-86  
 21 (1994) (refusing to expand the scope of liability under Bivens from  
 22 individual federal agents to actions against federal agencies);  
 23 Logan v. United States, No. 96-55042, 1996 U.S. App. LEXIS 32872,  
 24 at \*3 (9th Cir. Dec. 6, 1996); Mayben v. Barnes, 290 F. Supp. 2d  
 25 1169, 1172-73 (E.D. Cal. 2003); see also Cato v. United States, 70  
 26 F.3d 1103, 1110 (9th Cir. 1995) (concluding that "no Bivens-type  
 27 claim" may be asserted against the United States).

28 //

1       Moore brought this Bivens action against Defendants Lacy and  
 2 McFadden only in their official capacities. (Am. Compl. 1-2, ECF  
 3 No. 12.) He directed his allegations against Jarnecke, Woods, and  
 4 Villasenor in both their individual and official capacities. (Id.  
 5 at 2.) Claims against these Defendants in their official  
 6 capacities were improperly asserted. See Vaccaro, 81 F.3d at 856-  
 7 57 (explaining that in a Bivens action plaintiff can only sue the  
 8 officers in their individual capacities); see also Morgan v. United  
 9 States, 323 F.3d 776, 780 n.3 (9th Cir. 2003) (holding that  
 10 plaintiff cannot assert Bivens claim against defendants in their  
 11 official capacities); Wheeler v. United States Dep't of Educ., No.  
 12 1:09-CV-01631-LAO-SMS, 2010 U.S. Dist. LEXIS 72399, at \*6 (E.D.  
 13 Cal. July 19, 2010) (same); Pinson v. Norwood, No. EDCV 08-0660-AHS  
 14 (JTL), 2008 U.S. Dist. LEXIS 95082, at \*9-10 (C.D. Cal. Nov. 21,  
 15 2008) (concluding that plaintiff's Bivens allegations against  
 16 defendants in their official capacities were improper when  
 17 defendants were sued in both their individual and official  
 18 capacities).

19       A Bivens claim for damages cannot be asserted against  
 20 Defendants Lacy and McFadden for acts performed in their official  
 21 capacities. The provisions of Rule 4(i)(2) do not apply to service  
 22 on them. Because Moore's Bivens allegations against Jarnecke,  
 23 Woods, and Villasenor can only be brought against them as  
 24 individuals, Plaintiff was not required to serve the government  
 25 under Federal Rule of Civil Procedure 4(i). Vaccaro, 81 F.3d at  
 26 856-57; Mayben, 290 F. Supp. 2d at 1174-75.

27       //

28       //

1           **2.     Federal Rule of Civil Procedure 4(e) -- Serving an**  
 2           **Individual**

3           In a Bivens suit, plaintiffs must comply with Rule 4(e), not  
 4 Rule 4(i), to effect service. Wannsee Lao v. Ashcroft, No. C 08-  
 5 2776 P.H., 2009 U.S. Dist. LEXIS 23741, at \*21 (N.D. Cal. Mar. 11,  
 6 2009); see also Vaccaro 81 F.3d at 856 (finding service sufficient  
 7 when correctional officers and physicians named as defendants were  
 8 served, but not the United States Attorney and Attorney General);  
Callas v. United States Postal Serv., No. C 06-00006 SBA, 2006 U.S.  
 10 Dist. LEXIS 90734, at \*15 (N.D. Cal. Dec. 1, 2006). "Because  
 11 Bivens claims may be asserted only against federal officials in  
 12 their individual capacity, plaintiff is required to serve  
 13 [Defendant] personally, in accordance with the rules for individual  
 14 service . . . ." Wannsee Lao, 2009 U.S. Dist. LEXIS 23741, at \*21;  
 15 see Vaccaro 81 F.3d at 856; Callas, 2006 U.S. Dist. LEXIS 90734, at  
 16 \*15. Under Federal Rule of Civil Procedure 4(e)(2), service can be  
 17 accomplished by delivering a copy of the summons and complaint to  
 18 the individual personally or by leaving copies at the individual's  
 19 residence.

20           Moore did not serve Defendants Jarnecke or Woods in accordance  
 21 with Federal Rule of Civil Procedure 4(e). The summonses for them  
 22 were returned unexecuted because neither Defendant was located at  
 23 the address listed on the summons [ECF Nos. 16, 17].

24           Defendants Lacy and Villasenor state that partial service on  
 25 them was "incorrect and incomplete" under Federal Rule of Civil  
 26 Procedure 4(d), which pertains to "waiving service." (Mot. Dismiss  
 27 Attach. #1 Mem. P. & A. 8, ECF No. 30.) They do not explain why  
 28 service was deficient and do not argue that service was not in

1 substantial compliance with Rule 4(d). (Id.); see Jackson, 682  
2 F.2d at 1347. Defendants' Notice of Failure to Complete Service on  
3 Any Defendant also does not explain why Lacy's and Villasenor's  
4 waiver forms were "incorrect"; rather, it states that service was  
5 incomplete because Plaintiff failed to also serve the United States  
6 [ECF No. 20].

7 Rule 4(d) of the Federal Rules of Civil Procedure requires  
8 that the notice and request for waiver (1) be in writing and  
9 addressed to the defendant, (2) name the court where the complaint  
10 was filed, (3) be accompanied by the complaint, copies of a waiver  
11 form and a prepaid means of return, (4) inform the defendant of  
12 consequences of waiver, (5) include the date the request was sent,  
13 (6) give defendant a at least 30 days to return the waiver, and (7)  
14 be sent by first-class mail or other reliable means.

15 The docket shows that Villasenor's waiver of service was  
16 returned executed. (See Waiver Serv. Returned Executed Villasenor,  
17 ECF No. 18.) The Court's docket reflects: "WAIVER OF SERVICE  
18 Returned Executed by Thomas A Moore. Villasenor waiver sent on  
19 11/17/2009, answer due 1/19/2010." (Id.) Moreover, the actual  
20 waiver form that the United States Marshals Service mailed to  
21 Villasenor at the correctional facility states the following:  
22 "11/17/09 - Mailed [summons] & [complaint] to M.C.[.] 1/22/10 -  
23 Received Waiver of Service of Summons. Copy to Court & Plaintiff."  
24 (Id. at 1.) Defendant Villasenor signed and dated that waiver of  
25 service of summons form. (Id. at 2.) Villasenor has not shown why  
26 his waiver of service should be disregarded. His contention that  
27 he was improperly served is not convincing.

28 //

1           Likewise, the docket shows that Lacy executed a waiver of  
 2 service. (See Waiver Serv. Returned Executed USMS, ECF No. 19.)  
 3 Lacy also signed and dated the waiver form. (Id.) She has not  
 4 demonstrated why her waiver of service is ineffective.

5           Accordingly, Plaintiff has not completed personal service on  
 6 Defendants Jarnecke and Woods, and formal service on Lacy and  
 7 Villasenor has been waived.

8           **3. Federal Rule of Civil Procedure 4(m) -- Time Limit for  
 9 Service**

10           A plaintiff has 120 days from the date a complaint is filed  
 11 within which to serve the defendant. Fed. R. Civ. P. 4(m). "If  
 12 service of the summons and complaint is not made upon a defendant  
 13 within 120 days after the filing of the complaint, the court, upon  
 14 motion or on its own initiative after notice to the plaintiff,  
 15 shall dismiss the action without prejudice as to that defendant or  
 16 direct that service be effected within a specified time." Id.; see  
 17 Brunette v. Barbette, 923 F.2d 754, 757 (9th Cir. 1991) (affirming  
 18 dismissal of complaint for failure to timely serve the summons and  
 19 complaint); Tensile v. County of Contra Costa, 820 F.2d 319, 320  
 20 (9th Cir. 1987).

21           Plaintiff had 120 days from October 26, 2009, the date the  
 22 Amended Complaint was filed, to serve every Defendant. Fed. R.  
 23 Civ. P. 4(m). As noted above, Moore did not properly serve  
 24 Jarnecke and Woods in accordance with Federal Rule of Civil  
 25 Procedure 4(e). Moore was unable to serve McFadden by mail or  
 26 personally [ECF No. 15]. More than one year has elapsed since the  
 27 Amended Complaint was filed. Thus, Moore has not complied with  
 28 Federal Rule of Civil Procedure 4(m).

1       Nonetheless, the Court must extend the 120-day time period for  
 2 service of process if the plaintiff can show "good cause" why  
 3 service was not made within that time. Fed. R. Civ. P. 4(m); see  
 4 S.D. Cal. Civ. L.R. 4.1(a); Mann v. American Airlines, 324 F.3d  
 5 1088, 1090 n.2 (9th Cir. 2003) (citing Henderson v. United States,  
 6 517 U.S. 654, 662 (1996); Efaw v. Williams, 473 F.3d 1038, 1040  
 7 (9th Cir. 2007)). The plaintiff bears the burden of establishing  
 8 good cause. See Fed. R. Civ. P. 4(m). "At a minimum, 'good cause'  
 9 means excusable neglect. A plaintiff may also be required to show  
 10 the following: (a) the party to be served personally received  
 11 actual notice of the lawsuit; (b) the defendant would suffer no  
 12 prejudice; and (c) plaintiff would be severely prejudiced if his  
 13 complaint were dismissed." Brunette, 923 F.2d at 756 (citing Hart  
 14 v. United States, 817 F.2d 78, 80-81 (9th Cir. 1987)).  
 15 "[I]nadvertent error or ignorance of governing rules alone will not  
 16 excuse a litigant's failure to effect timely service." Hamilton v.  
 17 Endell, 981 F.2d 1062, 1065 (9th Cir. 1992); Tensile, 820 F.2d at  
 18 320. Additionally, a plaintiff's status as an unrepresented party  
 19 does not, by itself, establish good cause. Brunette, 923 F.2d at  
 20 757.

21       After Moore filed the Amended Complaint, he made some effort  
 22 to serve the summons and Amended Complaint on the Defendants within  
 23 the 120-day limit. He attempted to effect service on each  
 24 Defendant one time. The docket shows Lacy and Villasenor waived  
 25 service. Activity regarding attempted service of the summonses  
 26 spanned from November 9, 2009, to January 26, 2010 [ECF Nos. 14-  
 27 19]. Since then, however, Moore has not prosecuted the case. He  
 28 failed to participate in two court-ordered conferences and did not

1 provide the Court with a current mailing address. Plaintiff has  
 2 not opposed this Motion and has not requested an extension of time  
 3 to serve the three Defendants who have not waived service.

4         But even without good cause, a court has the discretion to  
 5 grant an extension. Mann, 324 F.3d at 1090 n.2; Oyama v. Sheehan,  
 6 253 F.3d 507, 513 (9th Cir. 2001) (citation omitted) ("Courts have  
 7 discretion under Rule 4(m), absent a showing of good cause, to  
 8 extend the time for service or to dismiss the action without  
 9 prejudice[]"); Efaw, 473 F.3d at 1040. When deciding whether to  
 10 grant a discretionary extension of time, "a district court may  
 11 consider factors 'like a statute of limitations bar, prejudice to  
 12 the defendant, actual notice of a lawsuit, and eventual service.'"  
 13 Efaw, 473 F.3d at 1041 (quoting Troxell v. Fedders of N. Am., Inc.,  
 14 160 F.3d 381, 383 (7th Cir. 1998)).

15         Here, the facts do not weigh in favor of granting a  
 16 discretionary extension of time. Plaintiff has not responded to  
 17 Defendants' Motion and has not offered any explanation for his  
 18 failure to properly serve McFadden, Jarnecke, and Woods.

19         Moore was released from custody of the Federal Bureau of  
 20 Prisons on February 4, 2010. (Id. Attach. #1 Mem. P. & A. 3  
 21 (citing id. Attach. #2 Ex. F.) Prior to that date, Plaintiff was  
 22 actively pursuing this action. He filed for in forma pauperis  
 23 status, requested leave to amend his Complaint, moved for an  
 24 extension of time to amend, and notified the Court of a change to  
 25 his mailing address [ECF Nos. 2, 3, 8, 10, 12]. The last document  
 26 Plaintiff filed was his Amended Complaint, which was filed on  
 27 October 26, 2009; he was released from custody approximately three  
 28 months later. (See id.) Since then, both the Clerk of Court and

1 defense counsel have been unable to deliver court-related documents  
 2 to Plaintiff by mail. Without some indication that Moore intends  
 3 to pursue his claims, the record suggests that he lost interest in  
 4 the matter when he was released from custody. Plaintiff's failure  
 5 to oppose Defendants' Motion to Dismiss weighs against any  
 6 suggestion that the Court should unilaterally grant an extension of  
 7 time to serve these Defendants.

8 Defendants' Motion to Dismiss because of Moore's failure to  
 9 complete service on the Defendants should be granted as to  
 10 Defendants McFadden, Woods, and Villasenor, but the Motion should  
 11 be denied as to Defendants Lacy and Jarnecke.

12 **III. CONCLUSION**

13 Moore has not provided the Court with a current mailing  
 14 address, in violation of the local rules. Other than filing his  
 15 First Amended Complaint on October 28, 2009, he has done nothing to  
 16 prosecute this action in the last thirteen months. Furthermore,  
 17 Plaintiff's failure to attend the July 1, 2010 case management  
 18 conference and the December 1, 2010 telephonic conference was in  
 19 violation of the Court's orders. Moore's failure to prosecute  
 20 warrants dismissal under Federal Rule of Civil Procedure 41(b) and  
 21 S.D. Cal. Civ. L.R. 41.1, 83.11(b). Defendants' Motion to Dismiss  
 22 should be **GRANTED**, and the Amended Complaint should be **DISMISSED**  
 23 without prejudice.

24 In addition, Moore has failed, without good cause, to  
 25 effectuate proper service on Defendants McFadden, Jarnecke, and  
 26 Woods within the 120-day time period proscribed in Federal Rule of  
 27 Civil Procedure 4(m), and there are no circumstances that would  
 28 justify an extension of time to serve them. Their Motion to

1 Dismiss for failure to properly serve them should be **GRANTED**.

2 Defendants Lacy and Villasenor's Motion to Dismiss for failure to  
3 properly serve them should be **DENIED**.

4 This Report and Recommendation will be submitted to the United  
5 States District Court judge assigned to this case, pursuant to the  
6 provisions of 28 U.S.C. § 636(b)(1). Any party may file written  
7 objections with the Court and serve a copy on all parties on or  
8 before January 14, 2011. The document should be captioned  
9 "Objections to Report and Recommendation." Any reply to the  
10 objections shall be served and filed on or before January 28, 2011.  
11 The parties are advised that failure to file objections within the  
12 specified time may waive the right to appeal the district court's  
13 order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

14 **IT IS SO ORDERED.**

15  
16 DATED: December 17, 2010

  
17 Ruben B. Brooks  
United States Magistrate Judge

18 cc: Judge Benitez  
19 All parties of record

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